

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STERICYCLE, INC.

Employer,

and

Case No: 04-RC-260408

**INTERNATIONAL ASSOCIATION OF
SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS, LOCAL
UNION #44,**

Petitioner.

**SUPPLEMENTAL AUTHORITY IN SUPPORT
OF EMPLOYER'S REQUEST FOR REVIEW**

Comes now Employer, Stericycle, Inc. ("Stericycle" or "Employer"), by its attorneys, pursuant to Sections 102.67 and 102.69(c)(2) of the National Labor Relations Board's ("Board") Rules and Regulations, and respectfully submits its Supplemental Authority in Support of Employer's Request for Review of the Regional Director's Decision on Objections, Order Setting Aside Election and Order Directing Rerun Election, dated October 9, 2020.

The Employer filed its Request for Review of the Regional Director's Decision on Objections, Order Setting Aside Election and Order Directing Rerun Election ("Request for Review") on October 23, 2020. On the same day, after the Employer had filed its Request for Review, the Pennsylvania Supreme Court issued its opinion in *In re: November 3, 2020 General Election*, __ A.3d __, 2020 WL 6252803 (Pa. Oct. 23, 2020). The Pennsylvania Supreme Court's opinion in that case is relevant to the issues raised in the Employer's Request for Review regarding the counting of ballots regardless of signatures.

In *In re: November 3, 2020 General Election*, the Pennsylvania Supreme Court determined that, in the U.S. general election of November 2, 2020, the Pennsylvania Election Code did not permit county election boards to reject absentee or mail-in ballots on the basis of signature variance. 2020 WL 6252803 at *1. After the Pennsylvania legislature instituted mail-in voting in October 2019 and amended the procedures in March 2020, the Secretary of the Commonwealth issued regulations for pre-canvassing and canvassing of mail-in ballots and absentee ballots which cautioned canvassers that “the Pennsylvania Election Code does not authorize the county board of election to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.* at *2. In supplemental guidance to county boards, the Secretary of the Commonwealth instructed county boards of elections that “the Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis . . . No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” *Id.*

The Secretary of the Commonwealth of Pennsylvania filed with the Pennsylvania Supreme Court an application seeking invocation of the Court’s King’s Bench authority, seeking a declaration that, under the Election Code, county boards of elections were precluded from rejecting the absentee or mail-in ballots at canvassing based on signature comparisons, in accordance with the Secretary’s guidance to local county election boards. *Id.* at *6. The Pennsylvania Supreme Court granted the application on the grounds that the Secretary “presented an issue of public importance” that required the court’s immediate intervention. *Id.* The Court also gave permission to the Republican Party of Pennsylvania, Donald J. Trump for President, Inc., the Republican National Committee and the National Republican Congressional Committee (“Intervenors”) to intervene in the case. *Id.* The Intervenors argued that the Pennsylvania Election Code’s

requirement that voters “shall” sign the declaration on the outside of the ballot return envelope, and the Code’s requirement that county boards examine the declaration and determine if it is “sufficient” meant that county boards were required to conduct signature verification. *Id.* at *8. The Secretary contended that the Election Code did *not* require signature verification, and that a signature comparison requirement would create “a significant risk of error and uncertainty in the review of ballots” due to the fact that there were no standards or guidelines in the Code governing how to perform signature verification and that, consequently, such procedures would vary from county to county and *ad hoc* procedures for signature verification would be improvised. *Id.* at *8.

The Pennsylvania Supreme Court rejected the Intervenor’s arguments, and determined that the plain language of the Election Code did **not** require signature verification during canvassing by county board officials. *Id.* at *12. It also noted that the Pennsylvania General Assembly “has been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter’s signature.” *Id.* The Court reasoned, “Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges.” *Id.* at *14. The Court held that “county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.” *Id.*

The federal District Court for the Western District of Pennsylvania reached the identical conclusion in *Donald J. Trump for President v. Boockvar*, __ F.Supp.3d __, 2020 WL 5997680

(W.D. Pa. Oct. 10, 2020). In that case, the Plaintiffs, President Trump’s reelection campaign, the Republican National Committee and other Republican congressional candidates and electors, filed suit in federal court, alleging that Pennsylvania’s institution of a mail-in voting plan for the November 3, 2020 General Election resulted in federal and state constitutional violations. *Id.* at *1. Among the claims raised by the Plaintiffs was the contention that the Secretary of the Commonwealth’s guidance to county election boards on the issue of signature verification was a violation of the First and Fourteenth Amendments and the Elections Clause of Article I, Section 4 of the United States Constitution. *Id.* at *52. The Plaintiffs argued that the Secretary violated the Pennsylvania Election Code when issuing the guidance and, consequently, unlawful votes would be counted and lawfully cast votes would be diluted. *Id.* The district court, however, granted summary judgment to the Secretary of the Commonwealth on the issue, however, concluding that she had **not** violated the Election Code in issuing guidance to county boards not to conduct signature verification of mail-in and absentee ballots. *Id.* The Court’s reasoning was similar to that of the Pennsylvania Supreme Court; it concluded that the plain language of the statute did not contain a signature verification requirement and noted that the Pennsylvania General Assembly had required signature verification in other sections of the Election Code and the absence of such a requirement in the mail-in provisions indicated legislative intent to not require such verification of mail-in ballots. *Id.* at *55-56. The court also reasoned that “imposing a signature-comparison requirement as to mail-in and absentee ballots runs the risk of restricting voters’ rights.” *Id.* at *57. The court rejected the Plaintiff’s claims that the lack of signature verification violated their substantive due process and equal protection rights. *Id.* at *58-63.

Although both of these cases involved the federal general election, the principles announced by the courts are directly applicable to this case. In this case, there is no dispute that

the mail-in ballot voided by the Board Agent was that of an eligible voter, Kareem Bishop. There is also no dispute that Bishop was qualified to vote and that he had legitimately attempted to vote. There was no allegation that any fraud was involved in Bishop's ballot. The fact that he did not sign the yellow outer envelope of his ballot should not have resulted in the voiding of his ballot. As can be seen from the opinions in *In re: November 3, 2020 General Election* and *Donald J. Trump for President v. Boockvar*, signatures are not necessary elements of valid ballots. When there is no issue about the validity of a ballot aside from the signature, there is simply no reason to void that ballot. As the district court noted in *Donald J. Trump for President v. Boockvar*, imposing signature requirements "runs the risk of restricting voters' rights." 2020 WL 5997680 at *57. In this case, the voiding of Bishop's ballot directly resulted in restricting his rights and elevated form over substance.

Additionally, the National Labor Relations Act shares a goal similar to the elections laws of Pennsylvania: to permit eligible voters to freely choose their representatives. In *Pennsylvania Democratic Party v. Boockvar*, __ A.3d __, 2020 WL 5554644, * 9 (Pa. Sept. 17, 2020), the Pennsylvania Supreme Court held, "Although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote." It also noted that "our goal must be to enfranchise and not to disenfranchise the electorate." *Id.* Similarly, the election of a collective bargaining agent is "a matter of the highest importance to employees and employers alike." *NLRB v. K & K Gourmet Meats*, 640 F.2d 460, 469 (3d Cir. 1981). The Third Circuit in *K & K Gourmet Meats* stated, "Legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election." In this case, the Board's Casehandling Manual requirement that a ballot envelope must be signed was misapplied in this case to effectively disenfranchise Bishop,

contrary to both Pennsylvania and NLRA policy. The signature requirement should have been “construed liberally in favor of the right to vote” in order to ensure a “free and fair election.” There was simply no need to void Bishop’s ballot when it was undisputed that he had attempted to vote and there was no fraud involved; instead the ballot should simply have been opened. Doing so would have been consistent with the goals of both the NLRA and the Pennsylvania Election Code.

For these reasons, and for the reasons fully set forth in Stericycle’s Request for Review of the Regional Director’s October 9, 2020 Decision on Objections, Order Setting Aside Election and Order Directing Rerun Election, the Board should grant Stericycle’s Request for Review.

Respectfully submitted,

McMAHON BERGER P.C.

/s/ James N. Foster, Jr.
James N. Foster, Jr.
Geoffrey M. Gilbert
2730 North Ballas Road, Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350 – Telephone
(314) 567-5968 – Facsimile
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2020, a true and correct copy of the above document was filed via electronically on the Board's website with the following individual:

Roxanne L. Rothchild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

/s/ James N. Foster, Jr.

I further certify that on the 30th day of October, 2020, a true and correct copy of the above document was served via email, upon:

Richard P. Heller
Acting Regional Director
National Labor Relations Board
Region 04
100 E. Penn Square, Suite 403
Philadelphia, Pennsylvania 19107

Jennifer A. Hadsall
Regional Director
National Labor Relations Board
Region 18
Federal Office Building
212 Third Avenue, South
Suite 200
Minneapolis, MN 55401-2657

Lance Geren
O'Donoghue & O'Donoghue, LLP
325 Chestnut Street, Suite 600
Philadelphia, PA 19106
lgeren@odonoghuelaw.com

/s/ James N. Foster, Jr.